U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

Date: October 28, 1997

Case No.: 95-INA-00697

In the Matter of:

ATILA RECORDS,
Employer

On Behalf Of:

SONJA REUTER,
Alien

Appearance: John M. Pocisk, President
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On July 28, 1993, Atila Records ("Employer") filed an application for labor certification to enable Sonja Reuter ("Alien") to fill the position of International Marketing and A & R Director (AF 178). The job duties for the position are:

> Make contracts with German firms, photo & layout album covers, compose liner notes, press officer for international market, artist and repertoire director, translator, working fax machines, telephone, computer, photocopy machines, typewriter, word processor. Traveling between Germany and Toledo, Ohio twice per year. One to two weeks per time. Also France once per year one week per time.

The requirements for the position are two years of college in the Journalism and Music Fields, one year of experience in the job offered, or one year of experience in the related occupation of Graphic Arts. The Employer listed "German Language" under Other Special Requirements.

The CO issued a Notice of Findings on July 13, 1995 (AF 173), proposing to deny certification on the grounds that the Employer's job requirement of two years of college in Journalism or Music does not constitute the actual minimum requirements for the position because the Alien does not appear to possess this requirement. The Employer was notified that it must submit a copy of the Alien's transcripts.

In its rebuttal, dated August 7, 1995 (AF 43), the Employer contended that the Alien studied three full years at the University of Hamburg, majoring in Philology, which incorporates Journalism. The Employer also submitted a list of credits from the University of Hamburg, samples of her interviews, short stories and essays translated from German, and her accomplishments as an editor for the *Heinrick Baur Verlag* and her apprenticeship for the magazines *Praline* and *Das Neue Blatt*. The Employer further stated that the position was advertised in the local newspaper, office memos, and the University of Toledo employment office. Six people applied for the position. One did not show up for his interview, and the other five were rejected as not qualified after being interviewed. The Employer noted that the Alien "reads, writes, and speaks both German[y] (sic) and English fluently and understands the local surrounds of Germany. She also has contacts with other Journalists and Editors which introduce

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

groups and records within their magazine." The Employer stated that 90% of its business comes from Germany.

The CO issued the Final Determination on August 11, 1995 (AF 39), denying certification because the Employer's evidence not only establishes that the Alien did not meet the minimum educational requirements at the time of hire, but also shows that the Alien's "only work experience is that of an Editor, a position that has no bearing, whatsoever, to the position of A & R Director." The transcripts from the University of Hamburg are in German, and translated by the Alien. They indicate the Alien's field of study was English Language and Literature (Philology) not Journalism. The CO further states that the Employer's statements in rebuttal indicate that the hiring of the Alien is more a preference because of her German background and contacts in the field of Journalism than a need for an A & R Director. The CO found that the Alien did not meet the minimum qualifications and the job was not a *bona fide* job offer open to qualified U.S. workers.

On September 12, 1995, the Employer requested review of the denial of labor certification (AF 1). The CO denied reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.21(b)(6) provides that "the employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and that the employer has not hired workers with less training and experience for that similar to that involved in the job opportunity. . . ." An employer is not allowed to treat an alien more favorably than it would a U.S. worker. *ERF, INC., d/b/a Bayside Motor Inn*, 89-INA-105 (Feb. 14, 1990); *International School of Dog Grooming*, 93-INA-300 (Oct. 4, 1995). An employer violates § 656.21(b)(6) if it hired the Alien with lower qualifications than it is now requiring and has not documented that it is now not feasible to hire a U.S. worker without that training and experience. *Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992); *Capricorn Systems, Inc.* 93-INA-333 (Aug. 30, 1995).

In the NOF, the CO requested that the Employer provide documentation that the Alien possessed the minimum educational requirements. The Employer's documentation shows that the Alien does not possess the requirement of two years of college study in the field of Music or Journalism, but instead shows that she possesses three years of college study in the area of English Language and Literature (Philology) (AF 49-89). Moreover, the Employer's documentation also shows that the Alien possesses experience as an Editor, but does not possess the one year of required experience as an International Marketer/A & R Director, or the related experience in Graphic Arts (AF 90-139). Accordingly, we find that the Employer has not documented that the Alien has the stated minimum requirements of the position. See *Excel Limousine Corp.*, 93-INA-233 (May 24, 1994); *Farbell Electronics*, 94-INA-59 (Apr. 28, 1995).

In the request for appeal, but not in its rebuttal, the Employer offered to drop the educational requirements of two years in Music and Journalism (AF 1). We note that even if the Employer were allowed to do so, this action would still not cure the problem with the Alien

not possessing the required work experience. See *Paragon Computer Professionals, Inc.*, 92-INA-49 (Sept. 1, 1993).

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.